(1) Supreme Court, U.S.
FILED
MAY 15 2006
OFFICE OF THE CLERK

No. 051471

In The

Supreme Court of the United States

HARRIS COUNTY TOLL ROAD AUTHORITY; HARRIS COUNTY,

Petitioners,

v.

CENTERPOINT ENERGY HOUSTON ELECTRIC LLC; CENTERPOINT ENERGY ENTEX, an Unincorporated Division of CenterPoint Energy Resources Corp.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. STAFFORD
County Attorney
Harris County, Texas

BRUCE S. POWERS*
Assistant County Attorney

1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-8359
Facsimile: (713) 755-8924

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals has misconstrued the term "eligible utility facility" as used in Section 251.102 of the Texas Transportation Code and thereby drastically increased the financial liability of Texas counties undertaking road construction projects beyond that which is authorized by Texas law.

2. Whether the question of the proper construction of the statute should be certified to the Texas Supreme Court for determination.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	10

TABLE OF APPENDICES

APPENDIX 1 – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 16, 2006 (REVISED JANUARY 20, 2006) .....App. 1

APPENDIX 2 – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED AUGUST 23, 2004 .....App. 21

APPENDIX 3 – FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED NOVEMBER 24, 2004 .....App. 30

APPENDIX 4 – ORDER OF THE UNITED STATES COURT OF APPEALS ON PETITION FOR REHEARING EN BANC FILED FEBRUARY 14, 2006.....App. 32

APPENDIX 5 – STATUTORY PROVISIONS.....App. 34

TABLE OF AUTHORITIES

Page

CASES

CenterPoint Energy Houston Electric LLC v. Harris County Toll Road Auth., 436 F.3d 541 (5th Cir. 2006) 3, 4, 6

City of San Antonio v. Bexar Metropolitan Water District, 309 S.W.2d 491 (Tex. Civ. App. – San Antonio 1958, writ ref'd) 5

Hardin County, Texas v. Trunk Line Gas Co., 311 F.2d 882 (5th Cir. 1963), *vacated*, 374 U.S. 8 (1963), *on remand*, 330 F.2d 789 (5th Cir. 1964) 7

Lehman Bros. v. Schein, 416 U.S. 386 (1974) 9

Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va., 464 U.S. 30 (1983) 4

State v. City of Austin, 160 Tex. 348, 331 S.W.2d 737 (1960) 4, 5, 6, 8

West v. American Tel. & Tel. Co., 311 U.S. 223 (1940) 9

STATUTES

28 U.S.C. § 1254(1) 1

TEX. TRANSP. CODE ANN. § 251.102 (Vernon 1999) ..... *passim*

RULES

TEX. R. APP. P. 58.1 9

PETITION FOR A WRIT OF CERTIORARI

Harris County Toll Road Authority and Harris County respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 436 F.3d 541 and is reproduced as Appendix 1 to this petition. The Court's order on Petition for Rehearing En Banc is unreported and is reproduced as Appendix 4 to this petition. The opinion of the district court is unreported and is reproduced as Appendix 2.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and judgment on January 16, 2006, and denied rehearing and rehearing en banc on February 14, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

TEX. TRANSP. CODE ANN. § 251.102

A county shall include the cost of relocating or adjusting an eligible utility facility in the expense of right-of-way acquisition.

STATEMENT OF THE CASE

This is a suit for damages and declaratory relief in which the Respondent utility companies assert claims under the Contract Clause, Article I, Section 10 of the United States Constitution, Article I, § 17 of the Texas Constitution and Section 251.102 of the Texas Transportation Code for the costs they incurred in relocating electric and gas utility facilities during Harris County's construction of a tollway project.

In June of 2001, Harris County began construction of the Westpark Tollway, a toll road along Westpark Drive in Houston, Texas. Respondents, CenterPoint Energy Houston Electric and CenterPoint Energy Entex, are utility companies providing services in the Houston, Texas area under franchise agreements. Respondents were required to relocate utility facilities along Westpark in order to accommodate the construction of the tollway. Petitioners reimbursed Respondents for their relocation of facilities located on condemned land, including land owned or easements acquired by Respondents. Petitioners declined to reimburse Respondents for the relocation of facilities that were located within existing street rights-of-way.

Respondents filed suit in state court, alleging that they had a right to reimbursement of all costs incurred in relocating their utility facilities. Petitioners timely removed the suit to federal court. Thereafter, the parties filed cross-motions for summary judgment. The district court granted Respondents' motion for summary judgment and denied Petitioners' cross-motion for summary judgment, relying upon Section 251.102 of the Texas Transportation Code as the basis for liability. The district court

entered a final judgment, awarding Respondents $10,256,673.97 in unreimbursed relocation costs.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed the district court's award of such costs, holding that CenterPoint is an "eligible utility facility" under Section 251.102 of the Texas Transportation Code and that Petitioners were required to reimburse Respondents for relocating their utility facilities. *CenterPoint Energy Houston Electric LLC v. Harris County Toll Road Auth.*, 436 F.3d 541, 542, 551 (5th Cir. 2006). The Court also vacated the district court's denial of attorney's fees and prejudgment interest and remanded the case to the district court to reconsider only those issues. *Id.* at 551. The Petitioners' timely filed petition for rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

This proceeding involves a question of exceptional importance to counties in Texas. The Fifth Circuit's construction of Section 251.102 of the Texas Transportation Code, which uses the Texas Supreme Court's criteria for "constitutionality" of reimbursement to a private party as the criteria for "eligibility" under the law for entitlement to reimbursement, effects a sea change in established Texas law. By misconstruing Texas state law and holding, in effect, that Section 251.102 requires counties to reimburse utility companies for relocating facilities located in pre-existing public road rights-of-way, the Fifth Circuit opinion will drastically increase the financial liability of Texas counties undertaking road construction projects beyond that which is authorized by Texas law.

Petitioners submit that the Fifth Circuit's analysis of Texas law is clearly incorrect. Historically, utilities were not "eligible under the law" for reimbursement unless the project in question was "eligible for federal participation" or the utility had a compensable property interest in the land occupied by the facility to be relocated. See *State v. City of Austin*, 331 S.W.2d 737, 746 (Tex. 1960) and *City of San Antonio v. Bexar Metropolitan Water District*, 309 S.W.2d 491, 492-493 (Tex. Civ. App. – San Antonio 1958, writ ref'd). Compare *Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983) ("Under the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities."). Section 251.102 of the Texas Transportation Code provides that "[a] county shall include the cost of relocating or adjusting an eligible utility facility in the expense of right-of-way acquisition". TEX. TRANSP. CODE ANN. § 251.102 (Vernon 1999). When construing this statutory provision, the Fifth Circuit acknowledged that Chapter 251 of the Transportation Code does not provide any guidance as to the meaning of "eligible utility facility" and that the words "eligible utility facility" are ambiguous. 436 F.3d at 545, 551. Although the Fifth Circuit appropriately considered the history and development of Section 251.102 of the Texas Transportation Code to discern the meaning of the phrase,[1] it misread

[1] The Court correctly focused on the source law for Section 251.102, i.e., former Articles 6674n-3 and 6702-1 § 4.303. 436 F.3d at 547-548. Former Article 6674n-3 provided that "in the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities which costs may be eligible under the law is hereby declared to be an expense and cost of right-of-way acquisition". Former Article 6702-1 provided that "the county

(Continued on following page)

the Texas Supreme Court's opinion in *State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737 (1960). The Court described that opinion as "foundational" and "determinative" of the outcome of this case. 436 F.3d at 549.

In *City of Austin* the issue was whether a former Texas statute, Article 6674w-4, which provided that " . . . the relocation of utility facilities necessitated by the improvement of highways established as part of the National System of Interstate and Defense Highways shall be made by the utility at the cost and expense of the state provided such relocation is eligible for Federal participation", was constitutional. Eligibility for reimbursement was not in issue. Nevertheless, when construing Section 251.102 in the instant case, the Fifth Circuit used the Texas Supreme Court's criteria for the "constitutionality" of the Legislature authorizing state reimbursement to a private party as the criteria for "eligibility" under the law for a utility to receive reimbursement. See *City of Austin*, 331 S.W.2d at 743 (use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is not unconstitutional "provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious"). The Fifth Circuit held that, because Section 251.102 operates prospectively, deals with a matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious, Respondents' relocation costs are "eligible under the law" for reimbursement.

---

should include the cost of relocating or adjusting eligible utility facilities in the expense of right-of-way acquisition".

436 F.3d at 549-550. From that it concluded that CenterPoint is an "eligible utility facility". 436 F.3d at 550-551. In so holding, the Fifth Circuit ignored the following language in the Texas Supreme Court's opinion:

> By the terms of Article 6674w-4, reimbursement for relocation costs is conditioned upon the eligibility of such relocation for Federal participation.
>
> * * *
>
> No part of the expense will be paid by the state, of course, if the relocation is not eligible for Federal participation, but in making this provision the Legislature was simply establishing a class of relocation projects for which the utilities will be entitled to reimbursement.

City of Austin, 331 S.W.2d at 746. The quoted statement makes it clear that "constitutionality" of authorizing reimbursement and "eligibility" under the law to receive reimbursement are separate issues. Petitioners submit that the Fifth Circuit's treatment of those issues as one and the same was a misapplication of Texas Supreme Court precedent.

Eligibility for reimbursement was undisputed in *City of Austin*. The question decided by the Texas Supreme Court was "whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose." *City of Austin*, 331 S.W.2d at 743. Thus, the Court was not addressing the question of which utilities were "eligible" under the law for reimbursement when it established the criteria for the constitutionality of reimbursement statutes.

Prior to the creation of the Texas Highway Department, the power to acquire right-of-way and to construct and improve roads and highways was vested exclusively in counties. *Hardin County, Texas v. Trunk Line Gas Co.*, 311 F.2d 882, 883 (5th Cir. 1963), *vacated*, 374 U.S. 8 (1963), *on remand*, 330 F.2d 789 (5th Cir. 1964). When the Highway Department was created, expenditure of county funds for improvement or construction of the state highway system was prohibited, save and expect for the acquisition of rights-of-way. See former Article 6674q-4, quoted in *Hardin County*, 311 F.2d at 884 ("No further improvement of said system shall be made with the aid of or with any moneys furnished by the counties except the acquisition of right-of-ways which may be furnished by the counties, their subdivisions or defined road districts."). The Fifth Circuit concluded in *Hardin County* that this limitation upon the authority of Texas counties prevented Hardin County from legally obligating itself to pay the cost of certain pipeline adjustments.

Apparently in direct response to the Fifth Circuit's decision, the Texas Legislature enacted former Article 6674n-3 which provided that "[i]n the acquisition of all highway rights-of-way by or for the Texas Highway Department, the cost of relocating or adjusting utility facilities *which cost may be eligible under the law* is hereby declared to be an expense and cost of right-of-way acquisition". Act of May 16, 1963, 58th Leg., R.S., ch. 240, § 1, 1963 Tex. Gen. Laws 654 (emphasis added). The emergency provision of that Act stated that it was necessary "in order to clarify existing law as to the *proper classification* of costs incurred for the relocation or adjustment of utility facilities as a part of the acquisition of right-of-way" (emphasis added). The Act was not intended to establish